

1 | this as precedent but it doesn't -- it's not appropriate for
2 | official notice. You don't take official notice of case
3 | precedent, is not what one takes official notice of.

4 | MR. CINNAMON: No, Your Honor, I'm not asking for
5 | official notice --

6 | JUDGE CHACHKIN: Well, you're using this as
7 | evidentiary proof, you're --

8 | MR. CINNAMON: I'm using it as a benchmark.

9 | JUDGE CHACHKIN: As an evidentiary basis for why
10 | your application should be granted --

11 | MR. CINNAMON: That's correct.

12 | JUDGE CHACHKIN: -- and I'm telling you it's
13 | inappropriate to take official notice for that purpose. You
14 | can use this if you want as precedent if you want to argue
15 | that on the basis of Palm Bay Radio, etc., etc., etc., that
16 | this is a legal precedent supporting you, you could argue
17 | that, but to take official notice is different and I don't
18 | propose to. I don't think it's appropriate purpose.

19 | MR. ZAUNER: Let me see if I can understand what
20 | you're saying, Your Honor. You're saying that in our proposed
21 | findings and conclusions if we cite Palm Bay Radio case as
22 | precedent we can also go back and compare the application in
23 | Palm Bay with the application that was filed here?

24 | JUDGE CHACHKIN: No, I'm not prepared to do that.

25 | MR. ZAUNER: We can't make any use of this

1 | whatsoever in our findings and conclusions?

2 | JUDGE CHACHKIN: That's correct.

3 | MR. ZAUNER: We can't say that the evidence
4 | submitted here was similar to the evidence that was submitted
5 | in Palm Bay and that was found acceptable in Palm Bay --

6 | JUDGE CHACHKIN: Only to the extent that the
7 | Commission in their decision, Commission in their decision in
8 | Palm Bay Radio refers to the application, or refers to the
9 | evidence submitted --

10 | MR. CINNAMON: Your Honor, it concludes, it
11 | concludes --

12 | JUDGE CHACHKIN: I am not --

13 | MR. CINNAMON: -- that the programming --

14 | MR. ZAUNER: You'd have to go behind the decision.

15 | JUDGE CHACHKIN: I am not going to go behind the
16 | decision, that's correct.

17 | MR. CINNAMON: Then how can we possibly -- if the
18 | Commission's decision --

19 | JUDGE CHACHKIN: I'm not --

20 | MR. CINNAMON: No, Your Honor, this is just a point
21 | of information so that I can write a proposed finding that
22 | perhaps can persuade you that I've done an adequate job for my
23 | client. How am I supposed to argue if the only thing that the
24 | Palm Bay Radio case as the decision wrote it stands for is the
25 | proposition that what Palm Bay Radio submitted in its

1 application is sufficient to qualify it under Section
2 73.503(a); if I cannot look back and see what was sufficient,
3 how am I go judge my own application against what was filed?
4 How am I supposed to demonstrate to you that what I filed is
5 comparable to what the Commission has already passed on?

6 JUDGE CHACHKIN: I'm not going to admit it.

7 (Whereupon, the document referred to as
8 CEA Exhibit No. 7 is rejected.)

9 MR. CINNAMON: I'm not asking for -- I'm asking for
10 advice.

11 JUDGE CHACHKIN: And I'm telling you, you're asking
12 me to make some kind of comparative determination for your
13 application of Palm Bay Radio and I'm not going to do so.
14 Your application stands on its own, either it meets the
15 standards or it doesn't meet the standards.

16 MR. CINNAMON: But part of that --

17 JUDGE CHACHKIN: If you had filed an identical
18 application as Palm Bay Radio then perhaps one could argue
19 here the Commission approved it, an application which
20 contained the same information and the Commission approved it,
21 therefore there's no reason why you shouldn't approve this.
22 But they provided -- they proposed an entirely different
23 program. I'm not going to make a qualitative judgment as to
24 whether your application is similar or better or worse than
25 Palm Bay Radio's. I will make my determination based on

1 Commission precedent.

2 MR. ZAUNER: I have to make that determination in my
3 proposed findings. I understand that, and you have to make
4 that determination in your decision too because you have to
5 sit there and you have to say based upon this decision whether
6 or not the application of Community Educational Association
7 can be granted. And you've got to look at the Palm Bay case
8 to make that decision so you're going to have to --

9 JUDGE CHACHKIN: For whatever reason the Commission
10 found this sufficient, and I'm not going to get -- there are
11 all kinds of differentiating factors, the programming as
12 proposed is different, the -- maybe the articles of
13 incorporation are different, I don't know, and I'm not going
14 to go back and try to glean any similarities or differences
15 between them. This case will fall on the facts of this case
16 and Commission precedent. And to the extent where the
17 Commission specifically says that certain information is
18 proper or not, fine, but I'm not going to go back and try to
19 glean from this whether this is similar or not similar. One
20 thing I noticed here, there's nothing in Palm Bay Radio which
21 says anything about selling the station which is referred to
22 in this case.

23 MR. CINNAMON: I'm sorry?

24 JUDGE CHACHKIN: I said there's nothing in the Palm
25 Bay Radio as far as I know here which -- isn't there some

1 reference in one of your amendments to the right to sell the
2 station or something, dispose of the station?

3 MR. CINNAMON: Not to my knowledge.

4 JUDGE CHACHKIN: There isn't?

5 MR. CINNAMON: Dispose of the station?

6 JUDGE CHACHKIN: Well, I mean providing authority
7 for -- where is your --

8 MR. ZAUNER: Are you talking about agreement 6,
9 Exhibit 1, page 5, dissolution?

10 JUDGE CHACHKIN: Yes. That's right.

11 MR. ZAUNER: But that's -- they don't have a
12 dissolution in the --

13 JUDGE CHACHKIN: Not as far as I can see.

14 MR. ZAUNER: Sounds like they had a bad draft then.
15 In the Palm Bay Radio case, Article 7, Exhibit 7, page 7, "In
16 the event of dissolution, the residual assets of the
17 corporation will be turned over to one or more organizations,
18 etc."

19 JUDGE CHACHKIN: What organization will it be turned
20 over to does it say? I'm not proposed to make some kind of
21 comparative evaluation between the two applications to see --
22 since they're not identical then I think the case has to rest
23 on the facts here and whether it satisfies the Commission's
24 requirements. The extent to which Commission precedent
25 illuminates the matter, fine. That's all I can say is I'm not

1 going to make a -- as I point out, they're not identical, they
2 have different provisions, different makeup. So I'm not going
3 to try to go behind the Commission's decision to find out why
4 they found it satisfactory. I don't think that's my -- I
5 don't think it would be proper to do so and I don't propose to
6 do it and that's why I won't accept official notice to rely on
7 the application itself.

8 MR. CINNAMON: Well, in light of your ruling, Your
9 Honor, I would renew my motion for a summary judgment at this
10 point. It is my contention as we sit here now that the
11 exhibits before you are satisfactory to meet the test in Palm
12 Bay Radio. We have satisfied every aspect of the Palm Bay
13 Radio case, we have provided a weekly programming schedule.
14 The programming offered is of, is of at least in the
15 applicant's opinion -- sufficiently defines educational
16 purposes and if you read Exhibit 7 it'll show you the
17 universities and the schools that they've made contact with
18 for purposes of fulfilling whatever obligation they might have
19 to offer instructional programming.

20 JUDGE CHACHKIN: Let's shortcut this. There's no
21 need for a closing argument. I'm not going to grant the
22 motion for summary decision. Just file your proposed findings
23 and I'll grant -- I'll file my -- and I'll issue my initial
24 decision. I've indicated there are many areas which I would
25 like to have illumination on and the extent to which you

1 provide it, it will certainly be useful. First of all, I'd
2 like to know whether you agree or disagree that the processing
3 standards which are referred to in the Federal Register are
4 applicable and appropriate to be used in determining whether
5 or not you meet the requirements for an educational
6 organization. If not, I'd like to know what requirements
7 should be -- which you consider to be appropriate and
8 precedent for that. And secondly, I also would like to have
9 whether or not you agree with me that the Commission's
10 educational standards are still apposite. I'd like to know --
11 tell me what extent particular programs that you're proposing
12 satisfy those standards; namely, provide instructional or
13 general educational. And insofar as general educational, the
14 extent to which you have precedent as to what constitutes
15 general educational, if there is any precedent, and I have not
16 reviewed everything. I'd like to know what the Commission
17 defines as general educational and any cases dealing with --
18 constitutes general educational. And the basis of that then I
19 will -- that's what information I would like to have and the
20 extent to which you provide that information it will be
21 helpful to me in rendering my determination.

22 MR. ZAUNER: And of course, to the extent that such
23 information exists; it does not seem to be a very widely
24 explored area.

25 JUDGE CHACHKIN: Well, I agree there are a limited

1 number of cases in this area -- more probably than the few
2 cases which we've discussed today, but I'm certain -- I agree
3 with you, this is an area which obviously there isn't much
4 precedent on.

5 MR. ZAUNER: What there is may be very difficult to
6 locate.

7 JUDGE CHACHKIN: Well, that may be true.

8 MR. ZAUNER: I'm referring to that 98 FCC 2nd 746
9 cited in the instructions.

10 JUDGE CHACHKIN: It seems to me the definition of
11 instructional is pretty clear and the Commission has pointed
12 out in cases instructional means courses given for credit. It
13 seems to me either it is a course given for credit with some
14 kind of educational institution, school, or it isn't. Now
15 also, another question I'd like to also bring out which I'd
16 like to get some assistance on is while the Commission says
17 that you can -- and there's been cases on that too, the
18 Commission says you can have -- you're not required to have
19 exclusively educational programming referring to Florence
20 Bridges, 44 FCC 2nd 667 which is a 1978 case. How much
21 programming which listed as instructional and general
22 educational programming is required to meet at least the
23 minimum to constitute an educational organization. I mean,
24 these are interesting questions and the point -- the problem
25 is perhaps that there haven't been any cases I know of which

1 have gone through hearing. I don't know, maybe there have
2 been.

3 MR. CINNAMON: Maricopia is the only one that comes
4 to mind right away. There was a case called Maricopia that
5 Judge Sipple handled and I believe that went up the rest of
6 the chain.

7 JUDGE CHACHKIN: To the Review Board? Well, we'll
8 see what -- I'll take a look at that and see what the Review
9 Board --

10 MR. CINNAMON: If my recollection is correct, it was
11 a tossup on the programming and they decided on a 307(b)
12 issue. They punted.

13 MR. ZAUNER: All of this may be very interesting,
14 but I think it's something that's not required any longer. I
15 think we've done away with this kind of under-brush
16 determining.

17 JUDGE CHACHKIN: What is under-brush? Maricopia is
18 a recent case.

19 MR. ZAUNER: I'm talking about your comments. I'm
20 not talking about --

21 JUDGE CHACHKIN: Well, this is a recent case. What
22 under-brush? I mean, either --

23 MR. ZAUNER: I'm talking about in changing the
24 showing that new applicants have to make for noncommercial
25 broadcast --

1 JUDGE CHACHKIN: You read to me -- what year was
2 that form came out?

3 MR. ZAUNER: I read you from the 1992 form.

4 JUDGE CHACHKIN: 1992 form?

5 MR. ZAUNER: Is that the one you're talking about?
6 That's the one that's currently in use. That's the one that
7 says you don't have --

8 MR. CINNAMON: That says -- that calls for just the
9 simple narrative.

10 MR. ZAUNER: -- to make these kinds of showings and
11 we don't have to sit here and split hairs over what's general
12 education and what isn't. This is just the kind of thing the
13 Commission is trying to get away from.

14 JUDGE CHACHKIN: Well, as far as I know they have
15 never rejected -- I'm not aware of any --

16 MR. ZAUNER: This will be the case they do it then.

17 JUDGE CHACHKIN: Well, perhaps it will be.

18 MR. CINNAMON: Your Honor, I'm in an uncomfortable
19 position. I really don't know how to work for my client at
20 this point. It seems to me that what you're asking the Bureau
21 to come back with is a full explanation of what the processing
22 guidelines are, what they mean and what they should be. Now,
23 I applied them -- I applied -- my client applied under the
24 guidelines he thought existed and if you're going to have an
25 inquiry into what the guidelines are and what they mean, is

1 | this the appropriate forum or is --

2 | JUDGE CHACHKIN: I'm not requiring them to do that.
3 | I just want you to give me reasons why they support a grant.
4 | If the support a grant then the basis for it and I've
5 | indicated the areas which I feel I'd like to have some
6 | information on.

7 | MR. CINNAMON: But you weren't happy when they
8 | supported a grant when they supported my motion for summary
9 | decision.

10 | JUDGE CHACHKIN: Because they didn't give me any
11 | reasons.

12 | MR. CINNAMON: Okay, so we need support with
13 | reasons.

14 | JUDGE CHACHKIN: That's reasonable.

15 | MR. CINNAMON: Well, I guess that means my reasons
16 | weren't proper either.

17 | JUDGE CHACHKIN: I've issued my memorandum, opinion
18 | and order which I told you the problems I had why I didn't
19 | grant my motion for summary decision. I don't have to go
20 | beyond that. All we're talking about -- as far as I know,
21 | that closes the record. The record is closed and we'll go off
22 | the record and establish procedural dates. I assume this is
23 | not going to take very long for you to --

24 | MR. ZAUNER: I have no idea even where to --

25 | MR. CINNAMON: Are we off the record?

1 JUDGE CHACHKIN: Yes, we're off.

2 (Whereupon, off the record.)

3 (Whereupon, on the record.)

4 JUDGE CHACHKIN: Off the record, the following dates
5 have been established. Proposed findings of fact and
6 conclusions of law will be filed by Janaury 26th, 1995, and
7 any replies thereto will be filed by February 2nd, 1995. We
8 are now in recess.

9 (Whereupon, off the record at 11:30 a.m.)

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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

Community Education Association, et al.

Name

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Washington, D.C.

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Date

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